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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 346 //

CANADA PACKERS, LIMITED,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

THE CONSOLIDATED PRINTING COMPANY, CHICAGO

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OPINIONS BELOW.

The report of the Interstate Commerce Commission, entered May 24, 1961, is reported at 313 I. C. C. 759, and is reproduced in Appendix of Defendants-Appellants,[2] pages

1. The Atchison, Topeka and Santa Fe Railway Company; The Chesapeake and Ohio Railway Company; Chicago, South Shore and South Bend Railroad; Detroit, Toledo and Ironton Railroad Company; Elgin, Joliet and Eastern Railway Company; Grand Trunk Western Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Wabash Railroad Company.

2. For brevity, the Appendix of Defendants-Appellants is hereinafter referred to as App. Dfts.

13-21. The order of the Interstate Commerce Commission entered August 28, 1962 (App. Dfts. pp. 22-25) is not reported.

The findings of fact and the conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 20, 1964 (App. Dfts. pp. 36-38) are not reported.

The opinion of the Court of Appeals, entered March 2, 1965 (App. A of Petition) is reported at 342 F. (2d) 563.

JURISDICTION.

The jurisdictional requisites are set forth adequately in the Petition.

QUESTION PRESENTED.

The question presented, as framed by petitioner, does not describe the issue involved with sufficient precision. It is submitted that the question presented can be described more accurately as follows:

Where the Interstate Commerce Commission found that charges assessed for railroad transportation of shipments from origins in the United States to destinations in Canada were in excess of maximum reasonableness, and where the Commission also had made findings of maximum reasonableness of rates from the same origins to the border crossings through which the international shipments passed en route to Canada, did the Commission exceed its territorial jurisdiction in failing to observe the maximum reasonable rates to the border crossings as a maximum guide in awarding damages with respect to charges assessed on the international shipments?

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act are set forth in the Petition (App. pp. 9-13).

STATEMENT.

The discussion in the Petition of the proceedings before the Interstate Commerce Commission and in the District Court is adequate. However, respondents consider it necessary to present a more comprehensive discussion of the proceedings in the Court of Appeals.

Two issues were before the Court of Appeals. The first issue was whether or not respondents had complied with the Interstate Commerce Commission's order of August 28, 1962, directing that reparation be paid by respondents to petitioner with respect to charges paid for transportation performed for petitioner in 1948. That order (App. Dfts. pp. 22-25) specified that petitioner, Canada Packers, was entitled to reparation from the respondents "insofar as the transportation took place over their lines in the United States," and specified particular amounts of damages in dollars and cents, subject to the qualification "insofar as the transportation took place in the United States." However, in computing the specific sums awarded, the Commission failed to restrict those amounts to charges paid for that part of the transportation that took place in the United States. Respondents, by refusing to pay reparation in the total sums listed and instead paying to petitioner an amount computed by deducting the portion attributable to transportation performed in Canada, contended that they had in fact complied with the terms of the Commission's order in the light of the specific territorial limitations included within the order.

This first issue, as described above, was considered by the Court of Appeals (App. A of Petition, pp. 2-3), but the Court did not resolve that issue.

The second issue, which was in fact resolved by the Court of Appeals, was whether, even if the respondents' interpretation of the language of the reparation order is not correct, such an order is beyond the territorial jurisdiction of the Commission. In reversing the judgment of the District Court, the Court of Appeals held that since respondents had demonstrated, by reference to the Commission's own prescription, maximum reasonable rates from the origins in New Mexico to the border points through which the international shipments moved, those rates must be considered as a maximum guide in awarding damages to petitioner. A contrary conclusion, the Court held, would require respondents to pay reparation on account of freight charges paid for that part of the transportation that was performed in Canada by Canadian railroads, a result prohibited by the territorial limitation provisions of Section 1 of the Interstate Commerce Act (App. A of Petition, pp. 3-6).

ARGUMENT.

The issue in the present case is narrow, and does not warrant review by this Court on certiorari. Petitioner suggests the possibility that this is a case of first impression (Petition p. 11). Respondents believe the particular issue has not been considered heretofore in the courts, even though the determinative territorial limitation provisions of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)) have been in effect since 1920.[3]

Petitioner asserts that the decision below is in conflict with this Court's decisions in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931). Respondents submit that the decision is readily distinguishable from the authorities relied upon by petitioner.

Section 1(5) of the Interstate Commerce Act (49 U. S. C. § 1(5)) requires that charges for the transportation of property "shall be just and reasonable" and prohibits every "unjust and unreasonable" charge. In *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), it was held that a shipper was entitled to reparation on account of unreasonableness of a joint international rate. However, in neither of the cases cited did the record, *unlike that here*, disclose the *just* and *reasonable* rate for that part of the transportation that was performed solely within the United States.[4] Hence, there was

3. See *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620-621 (1945).

4. *International Nickel Co.* v. *Director General*, 66 I. C. C. 627 (1922), cited on page 10 of the Petition, also was a case in which there was no evidence of a just and reasonable rate between the border crossing and the destination in the United States.

no basis, in fixing damages, for making a deduction on account of transportation performed beyond the international border, or for awarding any sum less than what petitioner describes repeatedly as "full reparation" (Petition pp. 6, 9, 10).

Thus, in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179, 187 (1927), involving a joint international rate from a point in Canada to a point in the United States, the Court pointed out:

> "The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of."

Similarly, in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660, 661-662 (1931), in discussing a joint international rate from a point in Mexico to a point in the United States, the Court declared:

> "The Act does not empower the Commission to prescribe or regulate such rates. It applies to international commerce only in so far as the transportation takes place within the United States. The Act applied to the transportation of the cow peas from the boundary to destination and required defendant to establish just and reasonable rates for that service. And defendant was liable to shippers for damages resulting from its failure so to do. §§ 1(1)(c), (2) and (5), 6(1), (7) and 8.
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> "While the Act does not govern the joint through international rate, the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate."

In the instant case the Court below was not relying as petitioner asserts (Petition p. 7), upon the "mere existence" of a rate between the origins in New Mexico and the border crossings at Detroit and Port Huron. Instead, as the Court point out (App. A of Petition, p. 3), the Interstate Commerce Commission itself had prescribed maximum reasonable rates from the origins to the border crossings retroactively to the very period of time within which petitioner's shipments had moved. This case, therefore, unlike either *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), or *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), involves the unusual circumstance of the Commission having made a determination of a just and reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to the destinations in Canada. Petitioner has been unable to cite any authorities recognizing jurisdiction of the Commission to award damages for assessment of an international joint rate without deduction of a proportionate share of the charges attributable to transportation performed within a foreign country where, as here, the charges clearly are separable.

Under the circumstances of this case, the Court of Appeals was correct in holding that the maximum reasonable rates from the United States origins to the international border crossings constitute a maximum guide in awarding damages to petitioner. That conclusion is consistent with the strict jurisdictional limitations of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)), as interpreted in *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620-621 (1945), in which this Court declared:

> "This Court has stated that the 1920 Act, containing this limiting clause, 'applies to international commerce

only in so far as the transportation takes place within the United States.' *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660. The question in that case was as to joint through railroad rates over a railroad route partly in the United States and partly in Mexico. The Court further said as to this situation that 'The Act does not empower the Commission to prescribe or regulate such rates."[9] In *St. Louis B. & M. R. Co.* v. *Brownsville District*, 304 U. S. 295, this Court was called upon to consider whether, under the 1920 Act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that in the absence of a discrimination against shippers, places, or classes of traffic within the United States, American railroads were 'not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico.' These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad,[10] it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries."

"9. Notwithstanding this, however, the Court held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission could, under the power given it by the 1920 Act, pass upon the reasonableness of the joint international rate.

"10. See *Knott* v. *Botany Mills*, 179 U. S. 69; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129."

Petitioner's apprehension (Petition p. 10) that the decision below will deprive the Commission of the power to award reparation to a shipper for an excessive international rate is misplaced. A careful reading of the opinion indicates that the Court of Appeals concerned itself only with the issue of whether the Interstate Commerce Commission may award damages on account of transportation performed within Canada where the record discloses the

measure of a maximum reasonable rate for the United States portion of the through transportation.

The precise effect of the decision can be gauged by reference to a specific example. Thus, the record discloses that the Commission found, in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87 (1957), that at the time petitioner's shipments moved in 1948, the maximum reasonable rate which the carriers could charge on potash from Carlsbad to Detroit was $12.70 per ton, and the Commission awarded reparation in the amount of 62¢ per ton since the carriers had assessed a rate of $13.32 per ton (Dfts. App. pp. 18, 32-33). In the instant case, the Commission, citing its *Consolidated Rendering* decision as its authority, held that the rate of $14.60 which the carriers charged on the Canada Packers shipments that moved from Carlsbad to Toronto via Detroit was in excess of a maximum reasonable rate of $13.80, and awarded reparation for the difference, 80¢ per ton (Dfts. App. pp. 18, 30, 32-33). Obviously, by awarding reparation in the amount of 62¢ per ton on shipments that terminated at Detroit and in the amount of 80¢ per ton on shipments that crossed the international boundary at Detroit and terminated at Toronto, the Commission was awarding 18¢ per ton damages attributable solely to transportation performed in Canada by Canadian railroads which are not parties to this litigation.

The decision of the Court of Appeals prevents Canada Packers from claiming an even greater windfall with respect to shipments that crossed the border at Detroit and went beyond Toronto to Montreal. In these instances the Commission, on the authority of its *Consolidated Rendering* decision, found that the rate charged, $17.20 per ton, was in excess of a maximum reasonable rate of $16.00, and awarded damages in the amount of the difference, $1.20 per

ton (Dfts. App. 18, 30, 32-33). This sum, it will be observed, substantially exceeds the reparation award of 62¢ per ton applicable to Detroit shipments, and even the reparation award of 80¢ per ton applicable to Toronto shipments. It is impossible to attribute the award of more extensive damages on shipments to Montreal than on those terminating at Toronto to anything other than the charges for performing the additional transportation service between Toronto and Montreal, wholly within Canada.

The statutory obligation of the respondents is to maintain a just and reasonable rate between the origin point in the United States and the international boundary, and here the Interstate Commerce Commission made a determination for the respondents of that maximum reasonable rate. Under these circumstances, the determination by that Commission that the rates to the more distant Canadian points contained a greater quantum of unreasonableness than was found to exist in the rate to the border necessarily means that the difference between the two represents and measures the excessive exaction of the Canadian railroads; and it thus necessarily follows that an award of the entire amount of reparation against respondents constitutes an attempt to penalize them for excessive charges collected by Canadian railroads for transportation performed within Canada.

Reversal of the decision below, as sought by petitioner, would make effective an order of the Commission plainly beyond its territorial jurisdiction that, by the strict terms of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)), is applicable "only in so far as such transportation takes place within the United States."

CONCLUSION.

The Interstate Commerce Act requires respondents to establish just and reasonable rates in so far as the transportation takes place in the United States. Here respondents demonstrated what the Commission itself had prescribed as just and reasonable rates between the United States origins and the international border. Therefore, the failure of the Commission to utilize the prescribed rates to the border points as a maximum guide in awarding damages on shipments terminating in Canada is indeed, as characterized by the Court of Appeals, a result that (App. A of Petition, p. 6) "clearly is prohibited by the territorial limitation provisions of Section 1 of the Interstate Commerce Act. 49 U. S. C. A. § 1, *et seq.*"

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

August 6, 1965

PROOF OF SERVICE.

I, Harvey Huston, attorney for respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 6th day of August, 1965, I served the foregoing brief as follows:

On petitioner by mailing copies, properly addressed, with first class postage prepaid, to Charles B. Myers, 611 Field Building, Chicago, Illinois, 60603.

HARVEY HUSTON.